United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

76-1284

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Appellant,

-v-

SYLVIO J. GRASSO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

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COUNTERSTATEMENT OF ISSUE PRESENTED

Whether retrial of the defendant after his original trial ended in a mistrial declared by the trial judge sua sponte would violate the Double Jeopardy Clause of the Fifth Amendment.

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal by the government from an order of the United States District Court for the District of Connecticut (Zampano, J.) granting the defendant's motion to dismiss the indictment on the ground that retrial of the defendant after his original trial ended in a mistrial declared by the trial judge sua sponte would violate the Double Jeopardy Clause of the Fifth Amendment. The court's written decision is reported at 413 F.Supp. 166, and appears in Appellant's Appendix at A-9.[1/]

Statement of Facts

On April 16, 1975 a three-count indictment was returned against the defendant-appellee, Sylvio J. Grasso,

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1/ Hereinafter all "A-" page references are to Appellant's Appendix.

charging violations of 26 U.S.C. §7201 (income tax evasion) for the years 1969, 1970 and 1971. (A-6). The defendant entered a plea of not guilty, and a jury trial was commenced in the United States District Court for the District of Connecticut before the Honorable T. Emmet Clarie, Chief Judge, on November 4, 1975.

At trial the government relied upon the net worth method of proof, and during its direct case called as a witness one Daniel Harris, a convict serving an 8 to 30 years sentence for sale of heroin, to establish that defendant Grasso received unreported income through dealings in narcotics.

On the final day of testimony of the approximately two-week trial, after over 50 witnesses, including the defendant, had testified and the defense had rested, Daniel Harris telephoned the Courthouse and left a message with the Judge's law clerk for defense attorney Henry Rothblatt to contact him immediately. Attorney Rothblatt called Harris at the telephone number indicated in the message, and at Harris' request went to see him at the local jail where he was incarcerated.

At the jail Harris and Attorney Rothblatt had a conversation which was tape recorded with Harris' knowledge and consent.2/ Harris stated that the testimony

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2/ A transcript of the conversation appears in Appellant's Appendix at A-42.

he had given at the trial--to the effect that he and defendant Grasso had narcotics dealings--was totally false and perjurious. He also said that prior to testifying at the trial he told IRS Agents and the Assistant United States Attorney in charge of the case that he did not want to testify, and that the Agents told him if he did not testify he would be charged with perjury, his parole would be violated, and he would be required to serve the remainder of his 30 year sentence.[3/]

During his tape recorded conversations with Henry Rothblatt, Harris repeatedly stated that he was speaking freely and voluntarily, that no one had told him to contact Mr. Rothblatt, and that he was not in any manner threatened or coerced into recanting his trial testimony.

The tape recording of Harris' recantation was filed as an exhibit and played for the court in chambers. Thereafter an evidentiary hearing was held outside the presence of the jury with regard to the circumstances

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3/ When Harris initially took the stand at the trial he requested an opportunity to speak with an attorney. An attorney was provided, and Harris told the attorney that he did not want to testify because the testimony he had given before the Grand Jury, which the government wanted him to repeat at trial, was untrue. (A-60). It was only after Harris spoke with the IRS Agents, the Assistant United States Attorney, and Mr. F. Mac Buckley (a former federal prosecutor who was involved in a 1973 narcotics prosecution against defendant Grasso which resulted in an acquittal, and who is also named as a defendant in a pending civil rights action brought by Grasso) that he agreed to testify.

surrounding Harris' initial refusal to testify, his change of mind, and his eventual recantation. Harris was called by the defendant as a witness at the hearing, but he refused to testify, claiming Fifth Amendment privilege.

At the conclusion of the hearing, defendant Grasso moved for dismissal of the indictment on the ground of prosecutorial misconduct surrounding the perjurious testimony of Daniel Harris. After hearing argument on the motion from the defendant and the government, the court rendered an oral ruling from the bench denying the motion for dismissal, but declaring a mistrial sua sponte.

At the conclusion of its ruling the court noted that

> . . . the Government can decide whether or not at any future time they wish to proceed further with the prosecution. At that time the issue of double jeopardy could be argued, and can move in proper form at that time. (A-35).

Both the government and the defendant indicated their opposition to the mistrial ruling, and the defendant renewed his request for dismissal, which was again denied (Id.).

The government then moved the case for retrial. The defendant immediately filed a motion to dismiss the indictment on grounds of double jeopardy, which was heard

by the Honorable Robert C. Zampano, to whom the case had been reassigned. Thereafter, in a written decision dated May 13, 1976, the court granted defendant's motion to dismiss. (A-9). The government now appeals from that decision.

ARGUMENT

I.

THE COURT BELOW WAS CORRECT IN HOLDING THAT RETRIAL OF THE DEFENDANT WOULD VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

At the outset it is important to emphasize that at the time Chief Judge Clarie, who presided at defendant's trial, declared a mistrial, he expressly reserved consideration of the double jeopardy issue raised thereby. At the conclusion of his oral ruling he stated:

> . . . the Government can decide whether or not at any future time they wish to proceed further with the prosecution. At that time the issue of double jeopardy could be argued, and can move in proper form at that time. (A-35).

And shortly thereafter, in discharging the jury he again stated:

> It is then up to the Government to decide whether they want to try the case over again, before another jury, and it is the privilege

> of the defendant to argue at that time the principle of double jeopardy. And at that time that issue will be resolved at any future trial that might be had. (A-40).

The government did seek a retrial, and the defendant promptly moved for dismissal of the indictment on the ground of double jeopardy. The case was reassigned by Chief Judge Clarie to Judge Zampano (A-14), who eventually granted the defendant's motion.

In view of these facts, we believe it is particularly inappropriate to cast the issue in this case in terms of an abuse of discretion, as the government seeks to do (see Appellant's brief, pp. 2, 12, 15, 16, 21), or to suggest that Judge Zampano erroneously "overruled or second guessed" Judge Clarie or was not "best suited intelligently" to make the determinations necessary to decide the motion (Id., p. 12). For on the one hand Judge Clarie was clearly indicating that in deciding to abort the trial he had not given full consideration to the issue of double jeopardy, and secondly, it was his decision to refer this issue to another judge.[4/]

4/ Also with regard to whether the issue here is one of abuse of discretion, see United States v. Glover, 506 F.2d 291, 299 n. 15, where in reversing a conviction and dismissing an indictment on double jeopardy grounds, the Court wrote:

> It would be stultifying to treat this appeal as involving "abuse of discretion." We do not cast the issue in those terms. . . .

A. The defendant neither requested nor consented to the declaration of a mistrial.

While obviously conceding that the defendant did not request the mistrial, the government contends that the defendant "impliedly consented" to it. (Appellant's Brief, pp. 15-21). The arguments advanced in support of this proposition are clearly without merit.

It is first argued that because the defendant moved for dismissal of the indictment on the ground of government misconduct upon learning of Daniel Harris' allegation that he was coerced into giving false testimony at the trial, the defendant

> should not now be allowed to argue that it was error for the trial court to grant the termination of the trial which defendant obviously sought, albeit in a different fashion.

(Appellant's Brief, p. 17).

Clearly, however, the relief which the defendant sought--dismissal of the indictment--is quite different, in both nature and effect, from a mistrial, and provides no basis for implying any degree of acquiescence in the court's sua sponte ruling.

As the court below held:

> The presentation of the motion to dismiss, the arguments of counsel pursuant thereto, the ruling of the trial judge, and the reaction of the attorneys immediately following the announcement of the mistrial, disclose conclusively that the only motion offered or intended to be offered was the motion to dismiss. There was no mention of a request for a mistrial as an acceptable alternative. (A-16).

Next, the government suggests that the defendant intentionally caused the mistrial by deliberately withholding prior inconsistent statements of Daniel Harris. As indicated in the affidavit of Henry Rothblatt submitted in the court below (A-112), there is absolutely no factual basis for this bizarre argument. If anything, the fact that Harris so readily disclosed the falsity of his testimony to individuals associated with the defense, on two separate occasions, only serves to render suspect the government's claim that they were unaware of the actual reason for Harris' reluctance to testify at trial.

Contrary to the government's conclusion in their brief (Appellant's Brief, p. 18), Judge Zampano did not overlook this argument; he rejected it:

> [T]he Court must reject the government's contention that there was an implied consent to the mistrial because the

> defendant's attorney engaged in a course of conduct calculated to abort the trial. Compare United States v. Gentile, supra [525 F. 2d 252 (2d Cir. 1975)] . . . . [I]t is plain from the record that there was neither impropriety or misconduct on the part of defense counsel during the events and proceedings surrounding the mistrial . . . . (A-17).

It is thus clear that the mistrial in this case was declared without the request or consent of the defendant, and must be scrutinized accordingly. See United States v. Jorn, 400 U.S. 470, 484-485 (1971).

B. The declaration of a mistrial was not a "manifest necessity" within the context of the Fifth Amendment prohibition against double jeopardy.

Since United States v. Perez, 9 Wheat 579, 6 L.Ed. 165 (1824), the standard for determining when the Fifth Amendment precludes retrial following the declaration of a mistrial without the defendant's consent is one of "manifest necessity":

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere.

> To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . .

Id., at 580, 6 L.Ed. 165.

As more recently emphasized by Mr. Justice Douglas, the discretion to discharge the jury before it has reached a verdict "is to be exercised 'only in very extraordinary and striking circumstances,'" and any doubt must be resolved "in favor of the liberty of the citizen . . . ." Downum v. United States, 372 U.S. 734, 736 (1963).

(1) The Defendant Did Not Benefit From the Mistrial

In Gori v. United States, 367 U.S. 364 (1961), the trial judge declared a mistrial sua sponte when it appeared that the prosecutor was improperly trying to suggest to the jury that the defendant had committed other crimes. In holding that the Double Jeopardy Clause did not bar reprosecution, the Court, through Justice Frankfurter, wrote:

> Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. . . .

367 U.S. at 369.

In the present case the government places substantial reliance upon this principle, and states that "it is obvious that the mistrial was declared in the sole interest of the defendant." (Appellant's brief, p. 11). However, rather than examining the causes and effects of the mistrial, the government bases this conclusion exclusively upon "Judge Clarie's language in declaring a mistrial." (Id.).

In addition to the fact that Judge Clarie did not in fact state that he was declaring the mistrial "in the sole interest of the defendant," the most important aspect of his oral ruling for present purposes was, as noted above, that he expressly reserved consideration of the double jeopardy question. (A-35).[5/] When the relevant factors are considered, it is clear, as the court below held, that the mistrial was certainly not in the "sole interest" of the defendant; it was in fact the government and the witness Harris who were the actual beneficiaries of the sua sponte ruling.

5/ Moreover, an indication by Judge Clarie as to which party he sought to protect by the declaration of a mistrial would not necessarily be determinative. As noted by the Fourth Circuit:

> At the outset, we put aside the trial judge's statement that his sole intent was to protect the interests of the defendants. Although a trial judge's beneficent motive was considered significant in Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961), it now can be accorded little or no weight. United States v. Jorn, 400 U.S. 470, 483, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971).

Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1123 (4th Cir. 1973).

The court below described the benefit that accrued to the government in the following terms:

> Judge Clarie noted after the hearing on the motion to dismiss that Harris was a "crucial" government witness (Tr., November 26, 1975, p. 12) who "couldn't be believed if he put his hand on two Bibles" (Id.) and whose credibility "contaminates the trial" (Id. at 18). It necessarily follows, therefore, that if the trial had been permitted to continue and the recantation evidence had been presented to the jury, it was more than likely the jury would have completely discounted Harris' testimony, as indeed Judge Clarie did, and acquitted the defendant, at least with respect to the 1970 tax year. There is little question that the recantation provided unexpected but welcomed evidentiary weaponry in defense counsel's arsenal to wage a strong assault on the government's case by renewed cross-examination and in summation. Few tools are more valuable to the skillful and experienced trial advocate to gain an acquittal in a criminal case than the sword of impeachment in combination with the shield of the doctrine of reasonable doubt. This is especially true in the context of a complex net worth tax prosecution wherein likely sources of unreported income are vital to a conviction. The mistrial here prevented defense counsel from discrediting a key government witness on this essential element of the crime and deprived the defendant of "the right to seek a favorable verdict from the first jury." United States v. Glover, 506 F.2d 291, 298 (2nd Cir. 1974). As stated by Justice Harlan in Jorn:

> . . . In the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. 400 U.S. at 486.

In addition, although the government objected to the mistrial, reprosecution would give it a solid tactical advantage. With commendable candor at the oral argument before this Court, government counsel admitted Harris would not be a witness on retrial. Thus the government would have ample time to retrench, to reconstruct its evidence, and to present its case against the defendant for the year 1970 without the tainted Harris testimony; or, it might proceed to seek convictions solely for the years 1969 and 1971. Cf. United States v. Kin Ping Cheung, 485 F.2d 689, 691-692 (5 Cir. 1973). While certainly not Judge Clarie's intention, it is evident that the mistrial served "as a post-jeopardy continuance to allow prosecution an opportunity to strenghten its case." Somerville, 410 U.S. at 469.

(A-19-20).

A somewhat similar situation arose in McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973), where in a murder prosecution one state witness gave testimony which the prosecutor neither wanted nor expected, and another surprisingly pleaded the Fifth Amendment. (In a way, the witness Harris did both in the present case). In holding that it was error to grant a nolle prosequi (which the court equated with a mistrial), the court wrote:

> We conclude that no manifest necessity and no ends of public justice required the granting of the nolle prosequi in McNeal's first trial. The prosecutor's uncomfortable position was caused by nothing more unusual than his reliance on a vacillating witness and on one whose testimony he had not sufficiently insured would be forthcoming. Ross [defense counsel], acting within this authority and professional responsibility, did no more than point out what at that time was a weakness in the presentation of the State's case. We hold that the granting of the nolle prosequi in order to allow the State an opportunity to shore up that weakness violated McNeal's Fifth and Fourteenth Amendment rights.

481 F.2d at 1152.

Similarly, in the present case the government was certainly put on notice that Daniel Harris was reluctant to testify. Rather than immediately disclosing the matter to the court, the government at worst threatened

and coerced Harris into testifying (A-58-63), and at best placed "reliance on a vacillating witness . . . whose testimony [they] had not sufficiently insured." In either event, they cannot, consistent with the Fifth Amendment, prosecute the defendant a second time.

Another beneficiary of the mistrial was the witness Daniel Harris. For after his tape-recorded recantation, on advice of counsel he refused to testify further, claiming Fifth Amendment privilege. He thus became unavailable to the defendant as a witness at both the evidentiary hearing that was conducted on defendant's motion for dismissal on grounds of government misconduct, and at the trial. This situation was somewhat analagous to United States v. Jorn, 400 U.S. 470 (1971), where the trial judge declared a mistrial sua sponte in order to protect the Fifth Amendment rights of certain government witnesses. There the Court, citing Gori, supra, held that it could not be said that under such circumstances the mistrial was "in the sole interest of the defendant," and the double jeopardy claim was upheld. Similarly, in the present case protection of Harris' Fifth Amendment rights in no way benefited

the defendant, and actually prejudiced him greatly.[6/]

It is thus clear that the government benefited from the mistrial by gaining a second, untainted opportunity to convict the defendant, and that Daniel Harris also benefited by not being required to give testimony concerning government misconduct and the falsity of his prior sworn testimony, thereby avoiding possible charges of perjury and/or revocation of parole. Conversely, the one party who clearly did not benefit from the mistrial was defendant Grasso.

6/ The prejudice to the defendant which flowed from Harris' refusal to testify at the evidentiary hearing on defendant's motion to dismiss the indictment on grounds of government misconduct is highlighted by the following argument which government counsel made in opposing the motion:

> Now, your Honor, as the finder of facts, will determine the credibility here. But I submit there is nothing in evidence [concerning government misconduct] for the Government to contend with except the tape. And obviously we can't cross examine the tape. (A-31).

In effect, the government relied upon the unavailability of Harris, who was the original evidentiary source, and only witness to the alleged government misconduct who could reasonably be expected to freely testify about it. Had he testified at the hearing rather than invoked the Fifth Amendment privilege, Judge Clarie might very well have decided the motion to dismiss in favor of the defendant rather than declared a mistrial. Or, had Harris been available to testify as a witness at a continuation of the trial, Judge Clarie might not have decided to abort the trial at all.

(2) There Were Several Reasonable Alternatives to a Mistrial

Another reason the mistrial was not a manifest necessity was that there were several alternative means of dealing with the situation that had arisen which were not explored. See Illinois v. Somerville, 410 U.S. 458, 481 (1973) (Marshall, J., dissenting); United States v. Kin Ping Cheung, 485 F.2d 689, 691 (5th Cir. 1973).

First, Daniel Harris certainly could have been recalled for further defense cross-examination before the jury. In the event his claim of Fifth Amendment privilege was valid (which we doubt, since according to the government following the recantation Harris eventually reverted back to his original testimony), he could have been granted immunity with regard to possible perjury. See United States v. Spinella, 506 F.2d 426, 432 (5th Cir. 1975).

Another alternative, in view of Harris' refusal to testify on Fifth Amendment grounds, would have been to admit the tape recording of his recantation into evidence under Fed. R. Evid. 804 (a)(1),(2) and 804 (b)(3), (5).

And still another alternative would have been to strike the testimony Harris had previously given with

appropriate instructions. See United States v. Cardillo, 316 F.2d 606 (2d Cir. 1963); Fountainhead v. United States, 384 F.2d 624 (5th Cir. 1967); United States v. Newman, 490 F.2d 139 (3rd Cir. 1974).

None of these possibilities were even discussed prior to the Court's sua sponte declaration of a mistrial.

This takes on added significance in the present case since at the time the trial was aborted the government was presenting its final rebuttal witness in what had been a complicated tax evasion trial at which over 50 witnesses testified and over 300 documents were admitted into evidence (A-9). The extent to which the original trial had advanced is frequently cited as a relevant consideration where a mistrial is declared sua sponte and the defendant raises a double jeopardy claim. See, e.g., United States v. Gentile, supra, 525 F.2d 252, 256 (2d Cir. 1975); United States v. Glover, supra, 506 F.2d 291, 298 (2d Cir. 1974). With the possible exception of a deadlocked-jury situation (see, e.g., United States v. Beckerman, 516 F.2d 905 [2d Cir. 1975]), one cannot find another example of any trial, much less one of this complexity, that was aborted at such a late stage without the defendant's consent. Surely, under the circumstances every possible alternative to a mistrial should have been thoroughly explored--with counsel participating, before the court took action sua sponte.

(3) It Was Clearly in the Defendant's Interest to Have the Trial Proceed to Verdict

A fundamental aspect of the double jeopardy prohibition is the defendant's right to have his fate decided by the original tribunal:

> [W]here the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." See Wade v.Hunter, 336 U.S., at 689, 93 L.Ed., at 978.
>
> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. . . .[T]he Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. . . .

United States v. Jorn, 400 U.S. 470, 484-485 (1971) (footnotes omitted). Also see Downum v. United States, 372 U.S. 734, 736 (1963); United States v. Glover, supra, at 298.

The above language is particulary relevant under the circumstances of this case.

First, it cannot be questioned that by virtue of Harris' recantation the defendant had gained a substantial tactical advantage at the trial. As noted by the court below:

> [I]f the trial had been permitted to continue and the recantation evidence had been presented to the jury, it was more than likely the jury would have completely discounted Harris' testimony, as indeed Judge Clarie did, and acquitted the defendant, at least with respect to the 1970 tax year. There is little question that the recantation provided unexpected but welcomed evidentiary weaponry in defense counsel's arsenal to wage a strong assault on the government's case by renewed cross-examination and in summation. . . . (A-19).

At a second trial this advantage will be lost, and, as noted above (pp. 13-14, supra) the defendant's loss will be the prosecution's gain.

Secondly, in recent years the defendant has been the subject of two other major felony prosecutions in addition to this case.[7/] In 1973, he was brought to trial on federal narcotics charges in the District of Massachussetts and was acquitted. Earlier this year he was prosecuted in the Connecticut Court of Common Pleas on conspiracy and larceny charges and was again acquitted. In both of these cases the

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7/ United States v. Grasso, No. 72-179 (D. of Mass.); State of Connecticut v. Grasso, No. CR14-172971 (Ct. of Common Pleas, Hartford Co.).

government unsuccessfully sought to reprosecute, and appealed.[8/]

Thus, this is the third occasion, in less than three years, that this defendant has been required to defend a criminal prosecution at both the trial and appellate level, and match his limited resources against those of the State. While he has not been convicted of any crime, he and his family have suffered tremendous hardship, his financial assets have been virtually exhausted, and he is substantially indebted for legal fees and expenses. It is beyond question that the defendant will be unable to finance an adequate defense, much less a defense comparable to that at the original trial (where he had tax counsel, trial counsel, and his own expert accounting witnesses), at a retrial of this indictment. Certainly this was an additional, most compelling reason why it was in the defendant's interest to have the original trial proceed to verdict, and why reprosecution should not be permitted. (See Decision of Judge Zampano, A-20).

8/ Neither appeal was successful. In the federal case the appellate court decided against the government (United States v. Grasso, No. 75-1222 [1st Cir. Dec. 29, 1975]), and the state appeal was recently withdrawn prior to submission when the invalidity of the State's position concerning their right to reprosecute was conclusively decided in another case.

CONCLUSION

The decision of the district court dismissing the indictment should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, N.Y.

That on the 21 day of SEPTEMBER, 1976, deponent personally served the within BRIEF FOR APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

PETER C. DORSEY
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Robert La Grassa

Sworn to before me this
21st day of September 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1973